

STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	)	
On Its Own Motion	)	
	)	01-0662
Investigation concerning	)	
Illinois Bell Telephone Company's	)	
compliance with Section 271 of	)	
the Telecommunications Act of	)	
1996.	)	

**Staff's Response To Ameritech's Motion  
to Establish Procedural Schedule for Phase 2**

The Staff of the Illinois Commerce Commission ("Staff"), by its attorneys, hereby responds to the Motion to Establish Procedural Schedule for Phase 2 ("Motion") filed on November 21, 2002, by Illinois Bell Telephone Company d/b/a Ameritech Illinois (the "Company" or "Ameritech").

Introduction

As explained in more detail below, Staff believes that it is premature to set a complete procedural schedule for Phase 2 at this time. Significantly, the Illinois Commerce Commission ("Commission") has not yet issued its order regarding the issues addressed in Phase 1 of this proceeding, and BearingPoint Inc. (f/k/a KPMG Consulting) has not yet issued its reports on the current results of its testing of Ameritech's operational support systems and performance measurements ("OSS Reports"). Staff and all parties will be in a much better position to opine on the scope of Phase 2, and the time that will be reasonably required to conduct Phase 2, after issuance of the Commission's Phase 1 order and issuance of BearingPoint's OSS Reports. Specifically, the work necessary to resolve any areas of non-compliance with requirements for Section 271 approval (as determined by the Commission in Phase 1)

cannot be fully assessed until issuance of the Commission's Phase 1 order. Similarly, the scope of the inquiry necessary to fully evaluate Ameritech's OSS systems cannot be accurately determined until the parties have had a chance to review BearingPoint's OSS Reports which have yet to be issued, in part by December 23, 2002<sup>1</sup>. Remediation of deficiencies identified in Phase 1 and evaluation of Ameritech's OSS and performance measurements are some of the main issues to be addressed in Phase 2 of this proceeding.

Staff agrees with the proposition that the Commission should address all Phase 2 issues in an expeditious manner. However, any schedule or process must maintain the quality and integrity of this Commission's inquiry into Phase 2 issues, and ensure the ability of all parties to adequately present and address Phase 2 issues. It is imperative that the schedule for Phase 2 allow for the development of the fullest record possible for the Commission to reach its decision. Ameritech's Motion requests that the Commission "adopt a schedule that would resolve the remaining issues in this proceeding by means of written submissions rather than contested case proceedings." *Motion* at 1. In its Initiating Order, the Commission determined that it would "hold evidentiary hearings and develop a comprehensive factual record in order to properly discharge its role as consultant to the FCC on matters related to Ameritech Illinois' compliance with Section 271 of the 1996 Act." *Investigation concerning Illinois Bell Telephone Company's Compliance with Section 271 of the Telecommunications Act of 1996*, ICC Docket No. 01-0662, Order Initiating Investigation at 3 (October 24, 2001)

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<sup>1</sup> Although the Commission was aware that the OSS test is ongoing and would complete in 2003, it directed BearingPoint to issue two separate reports (i.e., operational test results and performance measurements test results) by December 23, 2002. These reports will document the test results as of a date certain that would be prior to the production date of the reports.

("Initiating Order"). Staff supports the Commission's original determination in this regard, and submits that Ameritech's Motion is not consistent with the process required by the Commission in its Initiating Order and followed in Phase 1 of this proceeding. As to timing, Ameritech seeks a schedule that is completed in three months (by March 2002). *Motion* at 1. Although it is difficult to determine the amount of time reasonably required for Phase 2 until issuance of the Commission's Phase 1 order and BearingPoint's OSS Reports on December 23, it appears that three months will be insufficient to address the Phase 2 issues. Subject to review of the Phase 1 order and BearingPoint's OSS Reports, Staff submits that the minimum time required to address Phase 2 issues in an appropriate yet expedited manner is approximately five months from issuance of both the Commission's Phase 1 order and BearingPoint's OSS Reports (whichever occurs last).

### Scope of Phase 2

Establishment of a schedule for Phase 2 necessarily requires consideration of the scope of Phase 2. Although Ameritech's Motion mentions some of the Phase 2 issues, it omits others. Thus, Staff will summarize the general issues to be addressed in Phase 2. Staff submits that the schedule for Phase 2 should be designed to accommodate all issues that need to be addressed, and that Phase 2 should not be conducted in sub-phases. The Commission's initial decision to hold this proceeding in phases allowed the Commission and all parties to commence the huge task of investigating Ameritech's compliance with the requirements of Section 271 (notwithstanding that testing of Ameritech's OSS was not complete and that Ameritech was not ready to submit actual performance results). Although the utilization of a

phased approach has been useful thus far, the conduct of proceedings in phases requires more work overall and Phase 2 should not be divided into phases given that Ameritech provided its minimum 120-day notification to the ICC on November 8, 2002 of its intention to file its Section 271 application with the FCC. This would suggest that Ameritech believes it is ready to file its 271 application with the FCC. Therefore, Ameritech should be prepared to address all remaining issues at once – including remedial actions or showings necessary to resolve deficiencies identified in Phase 1.

Staff believes that the issues to be addressed in Phase 2 will generally consist of the following:

1. Resolution of Deficiencies Identified in the Commission's Phase 1 Order. Staff and intervenors have identified a significant number of deficiencies with respect to Ameritech's compliance with the requirements for Section 271 approval. In its Initiating Order, the Commission stated that it "will work with Ameritech Illinois, the CLECs, Staff and other interested parties to bring about any necessary changes or improvements [to achieve compliance with Section 271 requirements]." Initiating Order at 3. The resolution of Phase 1 deficiencies could require additional testimony in Phase 2. For example, Staff has asserted that Ameritech has failed to demonstrate that certain rates are TELRIC compliant. If the Commission agrees, Ameritech will need to submit evidence that such rates are TELRIC compliant in Phase 2. Additionally, Staff believes that any and all compliance actions and commitments should be made part of the record in this docket so as to avoid any confusion or ambiguity in the future.
2. Complete Analysis of Ameritech's OSS and Performance Measurements. In recognition of the fact that BearingPoint's testing of Ameritech's OSS and performance measurements was ongoing, the Commission's Initiating Order directed (i) that this proceeding be conducted in two or more phases, (ii) that "[t]he first phase . . . cover as much of the competitive checklist as possible absent OSS test results", and (iii) that "[t]he second phase . . . cover all remaining OSS issues . . . ." *Initiating Order* at 3. The Initiating Order also contemplated that the OSS test might be completed as early as March, 2002. *Id.* Although the Commission subsequently became aware that the OSS test was not likely to complete until 2003, it directed BearingPoint to issue two separate reports (i.e., operational test results and performance measurements test results) by December 23, 2002. Since Ameritech's proposed schedule contemplates commencement of Phase 2 with the filing of the BearingPoint December

23 OSS Reports, it is anticipated that should such schedule be adopted that the analysis of Ameritech's OSS and Performance Measurements would be based on those initial OSS reports. Ameritech has filed a notice of intent to introduce an audit of its Performance Measurements by Ernst & Young. In addition, Staff anticipates that CLECs may introduce evidence of any significant problems they are having with Ameritech's OSS. This is consistent with the Commission's Initiating Order that states, "[t]he second phase shall cover all remaining OSS issues. . . . To the extent that the status of an issue addressed in the first phase changes prior to the second phase order, the Commission will address the issue in the second phase order." *Initiating Order* at 3.

3. Analysis of Actual Performance Data. As the Commission stated in its Initiating Order, "[t]he FCC has also given substantial consideration to the performance measurement results within its competitive checklist review in each proceeding to determine whether nondiscriminatory access is being provided to the competitors by the BOCs." *Initiating Order* at 2. Ameritech did not submit its actual performance results in Phase 1, and states in its Motion that it will submit actual performance results "with a supporting affidavit that explains the data and the results" on January 17, 2002. *Motion* at 2. In addition, Staff anticipates that CLECs may introduce evidence of any significant problems they are having with Ameritech's actual performance.
4. Other Performance Measurement Issues. As a result of the Motion Of Ameritech Illinois To Amend A Portion Of The Schedule To Address Proposed Modifications To The Remedy Plan, virtually all testimony from Staff and Ameritech regarding performance measurement issues was carved out of the Phase 1 hearings and was never admitted into evidence or addressed in briefs. See *Notice of Administrative Law Judges Ruling*, Docket No. 01-0662 (June 14, 2002). These issues include Ameritech's commitment to and participation in the industry-wide performance measurement 6-month collaborative review, duration of performance measurement reporting, method of performance measurement reporting to the Commission, and future audits of performance measurements. Although these issues are not as extensive as the OSS and actual performance data issues discussed above, they are important issues that need to be addressed in Phase 2 of this proceeding.
5. Performance Remedy Plan Issues. Although the Commission has decided that Ameritech should implement the 01-0120 remedy plan for its Section 271 performance assurance plan, there are some open items regarding the remedy plan to be used for Section 271 purposes that need

to be addressed in Phase 2 as described in paragraphs 24 and 25 of Staff's Motion to Dismiss Phase 1B<sup>2</sup> filed on September 24, 2002.

6. All Other Relevant Issues Not Addressed in Phase 1. The Commission recognized in its Initiating Order that "[t]he second phase shall cover . . . any other relevant issues that were not addressed in the first phase." *Initiating Order* at 3. Although the parties obviously made a good faith effort to raise all known issues in Phase 1, there may be additional issues of which the parties are now aware given the amount of time that has passed since the preparation of testimony in Phase 1. Staff would anticipate that such additional issues would be limited. Nevertheless, the schedule for Phase 2 should allow for such issues to be raised and addressed.

In addition, it should be noted that discovery may be appropriate and necessary to adequately address some of these issues. Certain information, such as how the data regarding Ameritech's actual performance is gathered and maintained, is exclusively within the control of Ameritech. Thus, a Phase 2 schedule must allow adequate time for the parties to conduct discovery, and should require responses to discovery requests to be provided on an expedited basis.

#### Ameritech's Proposed Comment Process

Ameritech proposes a "comment/reply comment process be used in lieu of the contested case process in Phase 1." *Motion* at 3. Ameritech contends that "this process is particularly appropriate at this stage of the proceeding given the nature of the remaining issues." *Id.* To the contrary, this process is not appropriate for the following reasons. First, Ameritech's proposal focuses solely on the issues regarding an analysis of Ameritech's OSS and Performance Measurements and actual performance results, but does not acknowledge the other issues to be addressed in Phase 2 of this

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<sup>2</sup> *Staff Of The Illinois Commerce Commission's Motion To Dismiss Phase 1B Of This Proceeding, For Entry Of An Order Directing Ameritech To Verify Whether It Will Agree To Implement The 01-0120 Remedy Plan For Section 271 Approval Purposes, And For Administrative Notice Of The Remedy Plan Docket*, ICC Docket No. 01-0662 (September 24, 2002) ("Staff's Motion to Dismiss Phase 1B").

proceeding. These other issues will require testimony as well as discovery and cross-examination, if warranted. Ameritech's proposal does not allow for the handling of these other Phase 2 issues.

Second, Ameritech has not shown that a departure from the Commission's normal process is warranted or necessary. BearingPoint has been retained by the Commission to prepare the OSS Reports in connection with certain conditions imposed pursuant to the Commission's order approving the SBC/Ameritech merger, and introduction of the BearingPoint OSS Reports in this 271 proceeding is undoubtedly a unique situation. However, it does not follow (i) that the underlying issues to be addressed in Phase 2 of this 271 proceeding are fundamentally different from issues presented in other cases, or (ii) that those issues do not need to be developed through discovery, testimony, and cross-examination<sup>3</sup>. Staff submits that questions regarding Ameritech's actual performance and operation of its OSS are more fact based than most if not all of the issues addressed in Phase 1. Entry of evidence through affidavits or testimony and cross-examination will undoubtedly be crucial to resolving such issues and providing a complete record.

Third, as noted above, the Commission determined in its Initiating Order that this proceeding would be conducted through "evidentiary hearings". Initiating Order at 3. Further, although the purpose of this proceeding is to allow the Commission to consult with the FCC on Ameritech's compliance with the requirements for Section 271 authority, the Commission specifically provided in its Initiating Order that "[s]uch findings of fact as the Commission may adduce in the course of this proceeding may constitute a

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<sup>3</sup> Ameritech appears to acknowledge the need for a hearing where BearingPoint and Ernst & Young representatives answer questions under oath, but calls this an "open meeting". *Motion* at 3.

basis for such further compliance or enforcement action as the Commission may determine to be required by law or otherwise in the public interest, including, but not limited to, action under Sections 13-303, 13-303.5 and 13-304 of the Public Utilities Act.” *Id.* at 4. Thus, although this is not in the first instance a proceeding to determine rights or obligations, the Commission specifically allowed for the facts developed in this proceeding to form the basis for such action if warranted.

Finally, the fact that similar issues are being addressed in other Ameritech states does not provide a basis to limit the ability of parties in this proceeding to raise issues and test factual assertions. While some of the CLECs may have participated in Ameritech’s 271 proceedings in other States, neither Staff nor the Commission was a party to those proceedings. Even if a CLEC did participate in another State, that CLEC may have issues unique to Illinois or have different personnel handling the Illinois case. While the parties can be informed and benefit from work performed in other States, the existence of such other proceeding is not a reasonable basis to limit the information provided to the Commission by restricting discovery, testimony and hearings.

#### Ameritech’s Legal Assertions

A significant portion of Ameritech’s Motion is devoted to arguing that hearings and other procedural safeguards are not legally required in this proceeding. Although Staff agrees that the Commission had substantial latitude to decide how it would inform itself for purposes of its consultation with the FCC, the fact remains that the Commission decided to proceed via this docketed proceeding. Under the Commission’s Initiating Order, this proceeding is being conducted as a contested proceeding pursuant to Section 10-101 of the Public Utilities Act, 220 ILCS 5/10-101. Unless the



Commission changes its decision in this regard, there is simply no need to address Ameritech's argument. For the reasons stated above, Staff supports continuing the course already charted by the Commission.

#### Ameritech's Proposed Schedule

Staff does not support the schedule proposed by Ameritech in its Motion. In addition to the issues described above, Ameritech's schedule would not provide any opportunity for Staff or other parties to reply to Ameritech's arguments regarding Staff's and other parties' positions. Under Ameritech's schedule, Staff and other parties do not present their positions (in either affidavits, testimony, briefs or comments) until the post-open meeting comments on February 19, 2003. Ameritech would reply to those positions for the first time in reply comments on March 6, 2003, and Staff and other parties would never have an opportunity (in either affidavits, testimony, briefs or comments) to address the arguments raised in Ameritech's reply. This would present the Commission with a very incomplete record.<sup>4</sup> Ameritech's proposed schedule does not allow Staff and other parties to raise and adequately address factual disputes in the proposed comment process. Ameritech's proposed schedule also proposes a time line that, in Staff's opinion, is too short to adequately deal with the issues to be addressed in Phase 2.

As noted above, Staff believes that it is premature to set a schedule at this time, and that the schedule for Phase 2 should be set after issuance of the Commission's Phase 1 order and issuance of BearingPoint's OSS Reports, whichever occurs last. However, in the event that the Administrative Law Judge and/or the Commission believe

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<sup>4</sup> Ameritech's proposed schedule stops with reply comments. Staff believes that a proposed order and at least a brief on exceptions would be appropriate and beneficial for the parties, the ALJ and the Commission.

a schedule should be set at this time, Staff makes the following proposal based on information known to Staff at this time<sup>5</sup>. This schedule does not address issues concerning actions or showings required pursuant to the Commission's Phase 1 order (the process and procedure to address those issues would need to be determined separately).

BearingPoint OSS Reports & E&Y Metrics Report Issued	23-Dec
Ameritech files performance measurement data and supporting Affidavits or Testimony. Ameritech's Affidavits or Testimony shall contain Ameritech's positions or arguments with respect to the BearingPoint OSS Reports and the E&Y Metrics Report.	17-Jan
Transcribed Meetings/Hearings Start re: BearingPoint OSS Reports and the E&Y Metrics Report	23-Jan
Transcribed Meetings/Hearings End re: BearingPoint OSS Reports and the E&Y Metrics Report	24-Jan
Staff and Intervenor Direct Testimony/Affidavits	21-Feb
Ameritech Rebuttal Testimony/Affidavits	7-Mar
Staff and Intervenor Rebuttal Testimony/Affidavits	28-Mar
Hearings Start	1-Apr
Hearings End	3-Apr
Simultaneous Initial Comments/Briefs	29-Apr
Simultaneous Reply Comments/Briefs	20-May

Although Staff strongly supports the above-described schedule, and believes that this schedule is fair to all parties and will best facilitate the development of a full and complete record for the Commission, Staff also recognizes the possibility that the Commission could determine that a more expedited schedule is appropriate. Although

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<sup>5</sup> Staff's proposed schedule does not provide for sur-rebuttal testimony by Ameritech – an option normally provided to the party with the burden of proof. This omission was made consistent with Ameritech's expressed desire for an expedited Phase 2. Staff has no objection to extending the schedule to incorporate sur-rebuttal testimony if desired by Ameritech.

Staff does not support a more expedited schedule, the following schedule is provided to the Commission should Staff's position not be accepted. This alternative schedule is as follows:

BearingPoint OSS Reports & E&Y Metrics Report Issued	23-Dec
Ameritech files performance measurement data and supporting Affidavits or Testimony. Ameritech's Affidavits or Testimony shall contain Ameritech's positions or arguments with respect to the BearingPoint OSS Reports and the E&Y Metrics Report.	17-Jan
Transcribed Meetings/Hearings Start re: BearingPoint OSS Reports and the E&Y Metrics Report	23-Jan
Transcribed Meetings/Hearings End re: BearingPoint OSS Reports and the E&Y Metrics Report	24-Jan
Staff and Intervenor Direct Testimony/Affidavits	11-Feb
Ameritech Rebuttal Testimony/Affidavits	18-Feb
Staff and Intervenor Rebuttal Testimony/Affidavits	4-Mar
Hearings Start	11-Mar
Hearings End	13-Mar
Simultaneous Initial Comments/Briefs	27-Mar
Simultaneous Reply Comments/Briefs	8-Apr

The setting of a schedule is usually a matter addressed in status hearings rather than in a motion. Staff proposes that a status hearing may be the most appropriate manner to consider these issues and establish a schedule. Even assuming general agreement on a schedule, the parties often need to get together to resolve scheduling conflicts. Thus, Staff proposes that a status hearing be set in connection with Ameritech's Motion.

Wherefore, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

Respectfully submitted,

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